Supreme Court, U. S.
FILED
AUG 20 1975
CLERK

No. 75-28

In the Supreme Court of the United States

OCTOBER TERM, 1975

INSTITUTE OF SCRAP IRON AND STEEL, INC., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

ROBERT H. BORK,
Solicitor General,

THOMAS E. KAUPER,
Assistant Attorney General,

CARL D. LAWSON,
JAMES F. PONSOLDT,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

FRITZ R. KAHN,
General Counsel,

RICHARD H. STREETER,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 24023.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-28

INSTITUTE OF SCRAP IRON AND STEEL, INC., ET AL.,
APPELLANTS

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the opinion and order of a three-judge court (J.S. App. D, 22a-26a) dismissing an action to set aside an order of the Interstate Commerce Commission (J.S. App. C, 8a-21a). The Commission's order found a tariff rule published by certain rail carriers to be just and reasonable.

The tariff rule in dispute is Item 415 (Rule 4) of Freight Tariff S-215-K (J.S. App. F) published by the Southern Freight Association rail carriers.[1] Basically, the rule pro-

---

[1]The Southern Territory, in which the tariff is applicable, includes points in the states of Alabama, Florida, Georgia, Indiana (Evansville), Kentucky, Louisiana (East of the Mississippi River), Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

vides that where there is in effect a weight destination agreement,[2] freight charges will be based on the weight as determined at destination. In all other cases freight charges will be based on the weight as determined at the point of origin of the shipment. There is no additional charge for weighing for purposes of determining freight charges, whether made at origin or destination; rather, it is part of the line-haul charge. Where freight charges are based on destination weights, a shipper may obtain an origin weighing, but such an additional weighing results in a separate, additional charge.

In a complaint filed with the Commission in 1969, the Institute of Scrap Iron and Steel, on behalf of several members, alleged that this tariff rule permitting carriers to assess freight charges based on weights obtained at destination rather than at origin violated several sections of the Interstate Commerce Act.[3] Following receipt of evidence, the Administrative Law Judge found the rule not to be unjust or unreasonable or otherwise unlawful, and dismissed the complaint. In so finding, he observed that the complaining shippers did not contend they are entitled to free weighing at both origin and destination; rather their objective "appears to be to secure an origin weighing at no cost, despite the authorized destination weighing provided as part of the line-haul rate" (341 I.C.C. 771, 776). But the Administrative Law Judge found that since "[t]he requested

[2]A weight destination agreement is an agreement between a carrier and a consignee whereby the consignee undertakes the weighing of a shipment at destination (J.S. App. 5a).

[3]The sections allegedly violated were Sections 1(4), 1(5), 1(6), 2, 3(1), 6(3), 6(6), and 20(11) of the Act (49 U.S.C. 1(4), 1(5), 1(6), 2, 3(1), 6(3), 6(6), and 20(11)).

origin weight would serve the shipper's purposes other than to determine the freight charge" (*ibid.*) the cost of providing the additional weighing should not be borne by the carriers, because their statutory duty to weigh shipments is solely for the purpose of determining correct freight charges. The Administrative Law Judge's decision was subsequently affirmed by the Commission.

On review, the district court, without reaching the merits of plaintiffs' contentions, remanded the proceeding to the Commission for further articulation of its reasons for permitting what the district court perceived to be the conversion of "origin weighing, a service previously performed as part of the line-haul rate, into an 'accessorial' service when destination weight agreements are employed" (J.S. App. 5a).

On remand the Commission observed that if the "past railroad practice had been to include weighing at origin for the shipper's benefit, then such weighing service could properly be held to have been performed as an accessorial service", and a separate charge could not be approved for such an accessorial service unless the rail carriers could support it with substantial evidence (J.S. App. 14). However, after reviewing the record, the Commission determined that there was no evidence "that the railroads had ever held themselves out to perform a weighing service at origin *for the benefit of the shipper* as part of the line-haul rate" (*ibid.*) or "were performing origin weighing as an accessorial service (i.e., a service for the shipper's benefit other than to determine freight charges) prior to 1969 when the assailed item became effective * * *" (*id.* at 15a).

The Commission concluded that "there is nothing in the Interstate Commerce Act which requires a railroad to weigh a shipment at a particular time or in a particular way. Nor is there any requirement that the railroads are

obligated to provide a weighing service as part of the line-haul rate other than for the purpose of computing freight charges" (*id.* at 12a). Finally, the Commission found that the carriers had indicated the existence of several economic and operational benefits to be gained from weighing the shipment at destination rather than interrupting the movement of a train to remove cars in order to obtain the weight while en route (*id.* at 13a).

Subsequently, the district court, noting that "if the conclusions of the Commission have a rational basis, it is not for the Court to quarrel with them" (J.S. App. 23a), found that the Commission had adequately explained the reasons for its decision. The district court further concluded, upon reviewing the Commission's findings, that "there has been no change of longstanding 'policy.' Instead, a practice from which shippers derived incidental and fortuitous benefits has been changed" (*id.* at 25a). Thus, based "upon consideration of the Report and the standard of review stated in *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System*," 419 U.S. 281, the district court dismissed the complaint (J.S. App. 25a-26a).

ARGUMENT

The decision below is correct and does not warrant plenary review by this Court.

Appellants' sole contention[4] is that the tariff rule violates Section 20(11) of the Interstate Commerce Act, 49 U.S.C. 20(11), regarding the liability of carriers for loss

[4]Although in the district court appellants contended that the tariff rule was discriminatory, and although the first question presented in the Jurisdictional Statement (J.S. 3) refers to Sections 1(5), 1(6), 2, and 3(1) of the Act, appellants do not discuss this issue and apparently have abandoned it in this Court. In any event, the tariff rule is not discriminatory. Its provisions are applicable to all shippers in the relevant geographic area, and all shippers receive a weighing at no additional charge for purposes of determining freight charges.

of shipments. Appellants assert (J.S. 7-8) that Section 20(11)'s requirement that a carrier "issue a receipt or bill of lading" for property shipped imposes an obligation on carriers to provide origin weighing as part of the line-haul charge. But the Commission properly found that there is no historical precedent requiring "that the actual weight must be inserted in the bill of lading" (J.S. App. 17a) (see, *e.g.*, *Baird* v. *St. Louis, I.M. & S. Ry. Co.*, 41 Fed. 592, 594 (C. Ct. E.D. Ark.)) and nothing in either the language of Section 20(11) or its legislative history suggests that Congress intended to require a carrier to include origin weighing as part of the line-haul charge.

The tariff rule does not, of course, preclude a shipper from obtaining an origin weighing. It merely requires the shipper to pay an additional charge in cases where there is a destination weight agreement in effect.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

THOMAS E. KAUPER,
Assistant Attorney General.

CARL D. LAWSON,
JAMES F. PONSOLDT,
Attorneys.

FRITZ R. KAHN,
General Counsel,

RICHARD H. STREETER,
Attorney,
Interstate Commerce Commission.

AUGUST 1975.

DOJ-1975-08